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ABSTRACT

This chapter analyzes 1982 decisions involving legal issues in public school employment. Cases in areas of federal law are discussed first, including: discrimination in employment (race, sex, religion, age, and handicap); substantive constitutional rights (speech, association, and religion); and procedural due process (property interest, liberty interest, aspects of notice, and aspects of hearing). Issues of state law are then analyzed. The school board's authority is most often challenged in dismissal and discipline cases where charges include: insubordination, unprofessional conduct or unfitness, immorality, and incompetency; and in reduction-in-force cases involving elimination of position, selection of employee, realignment, and call-back rights. A discussion of contractual disputes, tenure, and certification cases follows. (MJL)

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EMPLOYEES

Joseph C. Beckham

Introduction 2.0
Discrimination in Employment 2.1
- Race 2.1a
- Sex 2.1b
- Religion 2.1c
- Age 2.1d
- Handicap 2.1e

Substantive Constitutional Rights 2.2
- Speech 2.2a
- Association 2.2b
- Religion 2.2c

Procedural Due Process 2.3
- Property Interest 2.3a
- Liberty Interest 2.2b
- Aspects of Notice 2.3c
- Aspects of Hearing 2.3d

Dismissal and Discipline 2.4
- Insubordination 2.4a
- Unprofessional Conduct or Unfitness 2.4b
- Immorality 2.4c
- Incompetency 2.4d

Reduction-in-Force and Abolition of Position 2.5
- Necessity for Reduction-in-Force 2.5a
- Elimination of Position 2.5b
- Selection of Employee 2.5c
- Realignment 2.5d
- Call-Back Rights 2.5e

Contractual Disputes 2.6
- Board Policies and Contract Stipulations 2.6a
- Administrative Regulations and Statutory Provisions 2.6b

Tenure 2.7
- Probationary Period 2.7a
- Tenure by Default or Acquiescence 2.7b
- Tenure Status 2.7c

Certification 2.8
Certification Standards 2.8a
Decertification, Revocation or Suspension 2.8b

2.0 INTRODUCTION

The following descriptive analysis of cases involving legal issues in public school employment follows the format developed in previous editions of this *Yearbook*, but omits consideration of cases involving disability and retirement. Cases selected for inclusion in this chapter involved public school employees or local, state or federal education agencies as principal parties, but do not include employment issues in the private sector.

2.1 DISCRIMINATION IN EMPLOYMENT

The shifting burden of proof in discrimination cases involving alleged violation of federal statute law continues to dominate litigation in the public employment sector. While appellate decisions often deal with federal constitutional questions as well, the predominant issues in current discrimination suits deal with provisions of Title VII and section 1983 of the Civil Rights Act of 1964.

2.1a Race

The nature of a defendant school district's rebuttal burden in a case involving discrimination on the basis of race can vary with the nature of the evidence presented by a plaintiff. School teachers who were not renewed by a district board contended that they had been discriminated against on the basis of race in violation of the equal protection clause of the fourteenth amendment. Using the test developed by the Supreme Court in *Texas Department of Community Affairs v. Burdine*,[1] the district court concluded that the school district need only articulate a legitimate, nondiscriminatory reason for discharge.[2] The Eleventh Circuit Court of Appeals found the district court's analysis insufficient. Reviewing a record in which considerable testimony made direct reference to the racially motivated intent of school board

1. 450 U.S. 248 (1981).
2. *Id.* at 257-58.

members, the court of appeals compelled remand for further review and analysis by the district court.[3] The admonishment on remand included a distinction between principles articulated in *McDonnell Douglas v. Green*[4] and *Mt. Healthy City School District v. Doyle.*[5]

In a case in which a black educator and former principal sought injunctive and other equitable relief based on provisions of Title VII of the Civil Rights Act of 1964,[6] the Court of Appeals for the Fourth Circuit ruled that the district court erred in refusing injunctive relief and in allocating the burden of persuasion in rebutting a claim of racial discrimination. A recent history of de jure racial discrimination in the school district was a primary consideration in shifting the burden of persuasion to the school system to rebut a prima facie claim of discrimination. On the basis of the record, the appellate court was unable to determine if the district court had required the school board to assume the burden of persuasion, and remanded for reconsideration of this issue, awarding attorney's fees to the educator as a prevailing party in the appeal.[7]

A black educator's employment discrimination suit was held to be time-barred in that the applicable statute of limitations of 180 days had run relative to any claim arising under Title VII of the 1964 Civil Rights Act.[8] However, the Eleventh Circuit remanded one claim of discrimination under the Civil Rights Act[9] for a determination of whether race played a role in the staffing of one principalship for which the black applicant was qualified. The record indicated that a white applicant of similar qualifications was selected because of a certificate of service with more years than the black applicant. However, the school district's witness conceded that such a certificate was not required to perform the job of principal. Given this information, together with testimony that a white principal was needed at the school in question because a black assistant principal was already at the school, the court remanded for consideration of a genuine issue of fact.[10]

2.1b Sex

The requirement that a school board show by a preponderance of the evidence that the employee would have been dismissed notwithstanding

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3. Lee v. Russell Cty. Bd. of Educ., 684 F.2d 769 (11th Cir. 1982).
4. 411 U.S. 792 (1973).
5. 429 U.S. 274 (1977).
6. 42 U.S.C. § 2000(e).
7. Evans v. Harnett Cty. Bd. of Educ., 684 F.2d 304 (4th Cir. 1982).
8. 42 U.S.C. § 2000(e)5.
9. 42 U.S.C. § 1981.
10. Stafford v. Muscogee Cty. Bd. of Educ., 688 F.2d 1383 (11th Cir. 1982).

the conduct protected under the United States Constitution was considered in a Fifth Circuit Court of Appeals' decision involving a teacher who was dismissed when she notified the board that she was pregnant out of wedlock. Upon a finding that discharge predicated on unwed parenthood violated the equal protection clause of the fourteenth amendment, the school board contended that discharge would have resulted even if the allegation of immorality were discharged, because the teacher failed to notify the superintendent by the fourth month of her pregnancy as required by district regulation. The court of appeals rejected this facile argument, pointing out that the school board must show that it would have dismissed the teacher in the absence of consideration of her out-of-wedlock pregnancy.[11]

The Ninth Circuit Court of Appeals overruled a federal district court's determination granting summary judgment in favor of a school district where the appellate court concluded that a genuine issue of fact existed as to whether a school principal's reassignment and subsequent discharge were the result of sex discrimination by the superintendent. The appellate court reviewed a record in which the superintendent's "attitudinal disposition" suggested difficulty in relating to women administrators and particular problems in working with the woman principal in the case. This evidence of a general disposition suggestive of sexism and animosity toward the principal might lead a jury to conclude that the real reason for reassignment and discharge was prejudice against women rather than financial exigency.[12]

The use of subjective promotion procedures, particularly "availability" for the job and willingness to work long hours, were given close scrutiny by the Eighth Circuit Court of Appeals in a Title VII sex discrimination case involving salary levels and promotion for female administrators, counselors and coaches. The school district was held to have unfairly emphasized one female teacher's family responsibilities as a factor in denying her a position as director of a teacher center. Persuasive evidence of preselection led the court to find that the school district had engaged in a further discriminatory practice with regard to the assignment of a counselor to fill a vacation position. (Testimony undisputed by the school district tended to show that the position announcement was not listed until after the position had been filled by a male applicant and the job requirement, certification in counseling and in French, was carefully tailored to fit the single male applicant within the district.) Finally, the court concluded that a prima facie case of discrimination in pay and promotion to

11. Avery v. Homewood City Bd. of Educ., 674 F.2d 337 (5th Cir. 1982).
12. Padway v. Palches, 665 F.2d 965 (9th Cir. 1982).

positions could not be sustained since the statistical evidence consisted of a small sample size for promotion and failed to consider the effect of education and experience together on salary. However, the court did find evidence to sustain a prima facie case of discrimination in that female coaches were given shorter term contracts, lower salaries and smaller extra duty stipends than male coaches who performed essentially the same duties.[13]

Although successful in establishing a prima facie case of age and sex discrimination under the *McDonnell Douglas* standard, a Title I part-time teacher lost her pro se appeal from a decision dismissing her claim with prejudice. In response to plaintiff's prima facie proof of discrimination, the school district presented what the trial court described as "overwhelming" evidence that the denial of a position to the teacher was free of unlawful discrimination. The record showed that the teacher had been a disruptive rather than contributive factor in the school system, and the trial court found that the teacher was denied renewal because of her unwillingness to observe rules and regulations, failure to work harmoniously with other staff and refusal to submit documentation essential to her employment. Finding no error, the Eighth Circuit Court of Appeal affirmed.[14]

Title IX of the Education Amendments of 1972 provides that "No person . . . shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subject to discrimination under any educational program or activity receiving federal financial assistance."[15] The United States Supreme Court has interpreted this statute to protect employees as well as students, though the application of the law appears to be limited to sex discrimination in the specific program receiving federal funds.[16]

The responsibility for policing sex discrimination in employment under Title IX falls to the Department of Education, which may institute action to withhold federal funds from any program that engages in illegal sex discrimination. While the law is "program specific" and limited to the program or part of a program in which sex discrimination is found, the Court did appear to recognize that a program can be "infected" by the discriminatory policies of an institution or the large environment, thus keeping open the door to a claim that system-wide discrimination had unduly influenced employment decision-making in the specific program.[17]

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13. Coble v. Hot Springs School Dist., 682 F.2d 721 (8th Cir. 1982).
14. Scharnhorst v. Independent School Dist. No. 710, 686 F.2d 637 (8th Cir. 1982).
15. 20 U.S.C. § 1681.
16. North Haven Bd. of Educ. v. Bell, 102 S. Ct. 1912 (1982).
17. *Id.*

A school board policy that denied credit toward seniority for service preceding a resignation was successfully challenged by a teacher who had been forced to resign due to pregnancy and was later reemployed by the school district. In affirming a decision of the New York State Division of Human Rights, the appellate court noted that the discriminatory practice was not the forced resignation policy that had been rescinded by the school board, but the computation method for seniority which disallowed all credit. The seniority computation scheme, by taking into account a forced resignation due to pregnancy, imposed a distinct burden on the teacher, imposing an unfavorable employment consequence attendant solely upon her pregnancy. The board's seniority computation effectively revived a discriminatory policy and constituted a separate discriminatory act—loss of seniority.[18]

2.1c Religion

A nontenured South Dakota junior high school teacher successfully established a prima facie case of religious discrimination under Title VII when he pleaded (and testimony confirmed) that his unapproved participation in a religious festival led to his discharge. The teacher, a member of the worldwide Church of God, informed the district one month in advance of his desire to attend a seven-day religious ceremony in October. The board refused to approve the request, contending that it would set a bad precedent for other leaves. Such a rationale was considered to evince the board's lack of willingness to accommodate the teacher's genuine religious beliefs. In response to the board's claim that accommodations would have been an undue hardship causing disruption of the school curriculum, the court took note of the fact that the teacher had made extensive lesson plans for the period of his absence, generating materials for use by students and detailed instructions for the substitute teacher. Testimony by the substitute teacher, principal and other members of the school staff failed to substantiate the board's claim of hardship based on disruption. The federal court found in favor of the teacher, holding the discharge unlawful, awarding backpay from the date of discharge to the date of entry of judgment, less the plaintiff's interim earnings.[19]

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18. Board of Educ. of Farmingdale v. New York State Div. of Human Rights, 451 N.Y.S.2d 700 (N.Y. 1982). *But see* White v. Columbus Bd. of Educ., 441 N.E.2d 303 (Ohio Ct. App. 1982) (no violation in failure to grant seniority rights). *Contra* Northville Pub. Schools v. Michigan Civil Rights Comm'n, 325 N.W.2d 497 (Mich. Ct. App. 1982).

19. Wangsness v. Watertown School Dist. No. 14-4, 541 F. Supp. 332 (D.S.D. 1982).

2.1d Age

In a memorandum opinion related to an action for wrongful discharge allegedly prohibited under the Age Discrimination in Employment Act of 1967 (ADEA),[20] a federal district court has ruled that the ADEA, as applied to a state's public schools, was a valid exercise of congressional power under the commerce clause and did not violate the tenth amendment.[21] In a decision upholding a regulation requiring mandatory retirement for school bus drivers upon reaching age 65, a New York court ruled the retirement age provision authorized by the ADEA was a bona fide occupational qualification.[22]

2.1e Handicap

The language of Title VI of the Civil Rights Act, Title IX of the Education Amendments of 1972 and section 504 of the Rehabilitation Act of 1973 is virtually identical.[23] A comparison of the provisions of the three statutes has led a federal district court to the conclusion that a blind mathematics teacher, who alleges employment discrimination based solely upon her handicap, can maintain an action under the provisions of the Rehabilitation Act. The decision, which follows the reasoning of the United States Supreme Court in *North Haven Board of Education v. Bell*,[24] precluded summary judgment in favor of the school board.[25]

2.2 SUBSTANTIVE CONSTITUTIONAL RIGHTS

Allegations of a denial of free speech under the first amendment is the most frequent substantive constitutional claim pressed by a plaintiff-employee in cases involving an adverse employment decision. Often these claims depend upon a careful analysis of factual questions initially resolved at the trial court level and reviewable only under the appellate court's "clearly erroneous" test.

2.2a Speech

Even if a probationary teacher could have been denied contract renewal by a school board for no reason, he or she may establish a

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20. 29 U.S.C. § 621.
21. Kenny v. Board of Trustees of Valley Cty. School Dist., 543 F. Supp. 1194 (D. Mont. 1982).
22. Sposato v. Ambach, 453 N.Y.S.2d 149 (N.Y. Sup. Ct. 1982).
23. *Compare* 42 U.S.C. § 2000(d) *with* 20 U.S.C. § 1681 *and* 29 U.S.C. § 794.
24. 102 S. Ct. 1912 (1982).
25. Pittsburgh Fed'n of Teachers v. Langer, 548 F. Supp. 434 (W.D. Pa. 1982).

claim for reinstatement where it is established that the decision not to renew was made in retaliation for the exercise of a constitutional right to free speech. Initially, the burden is on the nonrenewed teacher to establish that his or her conduct was protected and that the exercise of free speech was a substantial or motivating factor in the adverse employment decision. If the teacher can establish this claim, then the board must show by a preponderance of evidence that it could have reached the nonrenewal decision absent consideration of the protected speech.[26]

In one federal district court decision, numerous allegations of denial of due process and discrimination were dismissed due to lack of evidence, but an evaluator's recommendations not to renew a probationary teacher introduced a material issue of fact as to whether the teacher had been denied renewal for conduct protected under the first amendment. The court considered the whole evaluation record, including evidence the teacher was not renewed for inflexibility and lack of fairness in dealing with students, and concluded that the school board had established that the decision not to renew would have been the same despite the exercise of free speech.[27]

When a position elimination led to a proposal that two nontenured teachers share the remaining position, the more senior of the two employees opposed the plan and filed a grievance and accepted the administrator's recommendation to employ the less senior employee for the remaining position. Although the filing of a grievance is constitutionally protected conduct under the first amendment, the nonrenewed teacher did not show that the grievance was a substantial or motivating factor in the nonrenewal decision. Consequently, a jury verdict for the teacher was overturned and her complaint dismissed with prejudice.[28]

In affirming a determination that a school board's nonrenewal of teaching contracts was predicated upon the employee's circulation of a letter critical of board spending practices, the Eleventh Circuit Court of Appeals recognized the employee's right to presumptive reinstatement after a showing that the board had been sustantially motivated by the constitutionally protected conduct in refusing to rehire.[29] The court observed:

> When a person loses his job, it is at best disingenuous to say that money damages can suffice to make that person whole. The psychological benefits of work are intangible, yet they are

26. *See* Mt. Healthy City School Dist. v. Doyle, 429 U.S. 274 (1977).
27. Derrikson v. Board of Educ. of City of St. Louis, 537 F. Supp. 347 (E.D. Mo. 1982). *See also* McGee v. South Pemiscot School Dist., 545 F. Supp. 171 (E.D. Mo. 1982).
28. Renfroe v. Kirkpatrick, 549 F. Supp. 1368 (N.D. Ala. 1982).
29. Allen v. Antauga Cty. Bd. of Educ., 685 F.2d 1302 (11th Cir. 1982).

> real and cannot be ignored. Yet at the same time, there is a high probability that reinstatement will engender personal friction of one sort or another in almost every case in which a public employee is discharged for a constitutionally infirm reason.
>
> [W]e cannot allow actual or expected ill-feeling alone to justify nonreinstatement.[30]

A journalism teacher who was advisor to the school-sponsored paper was unsucessful in his claim that his nonrenewal was substantially protected rights, specifically his refusal to submit articles to the school principal for prior review and approval. The teacher repeatedly refused to obey requests to submit proposed articles to the principal. In applying the *Mt. Healthy* rationale to the balancing test of *Pickering v. Board of Education*,[31] the Ninth Circuit concluded that the former teacher's actions had substantially disrupted relations among students, other faculty and administrators, having a detrimental effect on intraschool harmony. Furthermore, the district court's evidentiary finding that the nonrenewal was not motivated by a desire to deny the free expression of the former teacher or his students was substantiated by evidence of the teacher's failure to follow school recordkeeping responsibilities and to require students to follow school rules and regulations relative to class attendance.[32]

In a controversy which arose out of an Alabama school board policy on prior approval of attempts to disseminate documents to teachers and hold special meetings on school grounds, the Fifth Circuit Court of Appeals upheld a district court determination that the prior approval standards to be applied by administrators were imprecise and violated the right to free expression guaranteed by the first amendment. While the court emphasized that prior submission and approval is a valid regulatory requirement for a school distribution policy, the court found that the policy as written and applied by school administrators failed to furnish sufficient guidance to prohibit the unbridled discretion proscribed by the Constitution. The court found it particularly unsatisfactory that the policy lacked any procedure for prompt review of a school administrator's decision denying distribution of documents or refusing permission for an individual to visit a school campus.[33]

In the aftermath of *Gibson v. Western Line Consolidated School District*[34] federal courts were compelled to recognize that private

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30. *Id.* at 1576.
31. 391 U.S. 563 (1968).
32. Nicholson v. Board of Educ., 682 F.2d 858 (9th Cir. 1982).
33. Hall v. Board of School Comm'rs of Mobile Cty., 681 F.2d 965 (5th Cir. 1982). *See also* Werner v. Middle Cty. Cent. School Dist., 454 N.Y.S.2d 116 (N.Y. App. Div. 1982).
34. 439 U.S. 410 (1979).

criticisms of school policy may be protected under the free speech provision of the first amendment. The *Givhan* case involved the nonrenewal of a teacher who was said to have a "hostile attitude" and who made "petty and unreasonable demands" of her school principal. The United States Supreme Court recognized the teacher's right to criticize school policies in private meetings with the principal, but remanded for a determination as to whether the teacher would have been rehired *but for* her exercise of constitutionally protected free speech. The Fifth Circuit Court of Appeals has now affirmed a finding of the district court which held that the school district's primary motivation in failing to renew Givhan was to rid itself of a vocal critic of district policies. The school district's efforts to establish other grounds for Givhan's nonretention, which included a belated contention that Givhan was unwilling to administer tests and was peripherally involved in a knife-shakedown incident with students, were rejected as afterthoughts or pretexts.[35]

2.2b Association

In another nonrenewal case, a director of vocational education alleged that his nonrenewal was based on his association with former members of the school board and on a letter he had written to the board. The right to freedom of association protected under the first amendment was recognized by the district court, but the court distinguished personal affinity from political expression of beliefs and held that a mere showing that the director was friends with former board members would not warrant Constitutional protection. As to the director's letter, it was established that the board members had voted against renewal of the director previous to receipt of his letter, thus the constitutionally protected exercise of free speech by the director was not a primary or motivating factor in nonrenewal by the board.[36]

2.2c Religion

In a case involving termination for negligence and persistent and willful violation of school laws, a tenured teacher sought to overturn the school board's dismissal decision by arguing a right to academic and religious freedom. An elementary school teacher had regularly undertaken religious exercises in his classroom, including Bible reading and audible prayer. Although state statutes permit a period of silent meditation, the Bible reading and extemporaneous prayer violated the

35. Ayers v. Western Line Consol. School Dist., 691 F.2d 766 (5th Cir. 1982).
36. Burris v. Willis Indep. School Dist., 537 F. Supp. 801 (S.D. Tex. 1982).

first amendment's establishment clause and was not authorized by state law. The teacher's refusal to comply with the superintendent's directives to cease the religious exercises was held to be a valid cause for termination.[37]

2.3 PROCEDURAL DUE PROCESS

There is no constitutional right to procedural due process unless the person has been deprived of a property or liberty interest. In the context of public school employment, the employee must demonstrate that a genuine entitlement has been denied or that a stigma has so foreclosed other employment opportunities as to invoke the protections of due process. Once it is determined that a deprivation has occurred, the court must resolve the question of what due process is due the employee. Aspects of state as well as federal law must be applied to assess the alleged deprivation and the requisite elements of notice and hearing that must be granted.

2.3a Property Interest

A teacher-coach employed under a series of three two-year contracts was not entitled to a due process hearing when he was offered a one-year contract and no property entitlement to a two-year or continuing contract existed under applicable state statute. Furthermore, when the school board sought to terminate the employee during the term of his contract appropriate written notice was provided and the opportunity to defend was reasonable despite the board's denial of a second continuance to the employee. (Discharge was appropriately predicated on several incidents in which the coach repeatedly threatened to kill colleagues, particularly the athletic director at his school.)[38]

A tenured teacher with an entitlement to due process under Illinois law was found not to meet the medical standard for teaching following a psychiatrist evaluation. The evaluation was compelled by the school superintendent after an investigation by the teacher's school principal led the principal to request the health examination. The teacher had complained that a student in his class sought to disrupt the class and turn other students against him. The principal requested that the teacher put his observations in a written memorandum, then used the memorandum as the basis for requesting the evaluation.

37. Fink v. Board of Educ. of Warren Cty., 442 A.2d 837 (Pa. Commw. Ct. 1982).
38. White v. South Park Indep. School Dist., 693 F.2d 1163 (5th Cir. 1982).

As a result of the evaluation, the teacher was told that dismissal would be recommended if he failed to request a leave of absence. The teacher chose the leave, but later contended that he had been compelled to leave his position and denied due process. The court held that no due process denial occurred when the teacher exercised the option of a leave rather than defend against a proper dismissal hearing.[39]

In a wrongful discharge claim decided under West Virginia law, the principal was not limited to a recovery of lost wages for the term of the breached contract because the provisions of state statute grant a right to renewal and due process hearings before contract termination of probationary employees. Mitigation of damages is applicable, however, whether another job is comparable to the original work contracted for or not.[40]

North Dakota provides due process hearing rights to nontenured personnel in a contract nonrenewal. A school district initially offered a modified contract at substantially lower salary to a teacher, and then withdrew the contract offer on the theory that the teacher failed to accept. The teacher prevailed in her demand for a hearing before the board, asserting that the modified contract constituted a nonrenewal. However, the reviewing court concluded that the due process procedures granted the teacher were sufficient to inform the teacher and avoid any abuse of discretion by the board.[41]

In determining legislative intent to aid in interpreting the meaning of full-time teacher, an Illinois appellate court ruled that the status of a probationary teacher is different from that of a substitute teacher who taught in the school district for one full year and the substitute teacher would not be entitled to the notice provisions of the school code.[42] Probationary teachers in New Hampshire are not entitled, on due process grounds, to a statement of reasons for nonrenewal, nor were they entitled to personal notice of a school board agenda item relating to renewals, particularly where the collective bargaining agreement precluded personal notice.[43]

Under California law, a teacher reassignment from district high school to a middle school is valid if within the scope of the certificate under which the teacher obtained tenure and would not require due

39. Dusanek v. Hannon, 677 F.2d 538 (7th Cir. 1982).
40. Mason Cty. Bd. of Educ. v. State Supt. of Schools, 295 S.E.2d 721 (W. Va. 1982). *See also* Brooks v. School Bd. of Brevard Cty., 419 So. 2d 659 (Fla. Dist. Ct. App. 1982) (allowing interest from date contracted debt became due).
41. Quarles v. McKenzie Pub. School Dist., 325 N.W.2d 662 (N.D. 1982).
42. Booker v. Hutsonville School Dist., 437 N.E.2d 937 (Ill. Ct. App. 1982).
43. Brown v. Bedford School Bd., 448 A.2d 1375 (N.H. 1982).

process hearings.[44] Under applicable Indiana statutes a teacher who taught under a supplemental services contract for more than 120 days during the school year was entitled to receive the same pay as a regular teacher and prior notice of nonrenewal of her contract.[45]

In a case from the District of Columbia, a dismissed teacher who established that the school board's action in terminating her violated statutory due process requirements was successful in obtaining a rehearing on the dismissal before the school board. However, the dismissed teacher could not claim reinstatement and backpay if she could have been discharged once accorded procedural due process.[46]

An employee's contention that she was "demoted" in a reassignment from counselor to classroom teacher was rejected by a Missouri court on the grounds that no change in salary resulted. While no due process denial could be advanced by the reassigned employee, the court did remand for further proceedings on the issue of whether the transfer was punishment for the exercise of free speech.[47]

2.3b Liberty Interest

Demotion of a school principal to a position of teacher and football coach as not sufficiently stigmatizing nor violative of tenure law to create a denial of due process under Kentucky law. In the absence of tenure eligibility the demotion and later nonrenewal of the employee in consecutive years did not deprive him of a property right cognizable under federal law.[48]

A Missouri school board's decision not to renew a nontenured principal's contract did not deny any established "legitimate expectancy of continued employment" or create a stigma which would compel due process rights to a hearing where the former principal had a combined total of twenty-seven years employment either as a teacher or principal in the district but who had not been employed five times within the district as principal.[49]

The Fifth Circuit Court of Appeals upheld the extension of a student dress code, which prohibited the wearing of a beard, to all employees

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44. Malynn v. Morgan Hill Unified School Dist., 187 Cal. Rptr. 303 (Cal. Ct. App. 1982).
45. New Castle Commun. School Corp. v. Watters, 437 N.E.2d 1372 (Ind. Ct. App. 1982).
46. District of Columbia v. Gray, 452 A.2d 962 (D.C. Ct. App. 1982). *See also* District of Columbia v. Moore, 453 A.2d 806 (D.C. Ct. App. 1982).
47. Glanville v. Hickory Cty. Reorganized School Dist., 637 S.W.2d 328 (Mo. Ct. App. 1982). *See also* Hood v. Alabama State Tenure Comm'n, 418 So. 2d 131 (Ala. Ct. App. 1982) (transfer to position outside area of certification).
48. Board of Educ. of Bellevue v. Rothfuss, 639 S.W.2d 545 (Ky. 1982).
49. Beal v. Board of Educ., 637 S.W.2d 309 (Mo. Ct. App. 1982).

of the system. While the board's policy would proscribe a constitutional liberty interest in choosing how to wear one's hair, the court held that the interest may be reasonably regulated. In this case, the application of the code could be justified as furthering the school board's reasonable interest in teaching hygiene, instilling discipline, asserting authority and uniformity and was, therefore, a valid regulation.[50]

2.3c Aspects of Notice

A school board's decision not to reemploy a probationary teacher was held to be invalid where the board failed to follow required evaluation procedures specified under state statute law and state regulation. The applicable state regulation prohibited discharge for reasons having to do with a remediable incompetency that had not been called to the attention of the employee through evaluation. The Supreme Court of Appeals of West Virginia ordered reinstatement of the teacher based upon a denial of due process which resulted from a combination of actions attributable to the local board and the school principal who was charged with conducting personnel evaluations. Among the cumulative acts which were construed as denying due process and lacking in open and fair evaluation protocol were conflicting evaluations of the probationary teacher's job performance. (The most negative evaluations came subsequent to the teacher's criticisms of the principal's methods of monitoring classroom activity through unannounced listening over the public address system.[51]

A West Virginia school board's failure to follow the evaluation procedures required by state board of education policy led to the reinstatement of a probationary teacher who was neither openly and honestly evaluated nor given a meaningful opportunity to improve performance. The record disclosed that classroom observations were limited and the teacher never received a conference on her teaching performance until after a nonrenewal recommendation had been submitted to the board.[52]

Notice requirements in cases of nonrenewal vary from state to state, but generally require timely notice in advance of the following school year and a reasonably effort to inform the nonrenewed employee. In Georgia, notice must be served personally or by certified mail delivered to the last known address of the employee. Although a certified letter constituting notice was sent to the teacher, the wrong address was affixed. Despite this flaw, the Supreme Court of Georgia held notice

50. Domico v. Rapides Parish School Bd., 675 F.2d 100 (5th Cir. 1982).
51. Wilt v. Flanigan, 294 S.E.2d 189 (W. Va. 1982).
52. Lipan v. Board of Educ. of Hancock, 295 S.E.2d 44 (W. Va. 1982).

sufficient because the diligence of the post office insured compliance with the law. Specifically, the erroneous address was corrected by a postal employee, the correct carrier attempted delivery and left notice of the attempted delivery.[53]

Substantial compliance with procedural and substantive provisions of the Arkansas dismissal statute was recognized by the Supreme Court of Arkansas in the nonrenewal of two district teacher-coaches. The coaches were given notive in 1979 of unsatisfactory performance related to their inability to field competitive football teams. In the absence of consistent improvement over a subsequent two-year period, the board gave notice it would consider nonrenewal, gave reasons for its action and held public hearings on the matter.[54]

Under statute law in Colorado the nontenured teacher is automatically reemployed for another annual contract period unless the school board gives written notice of nonrenewal on or before April 15th of each year. Following the generally accepted principle of strict statutory construction in matters of employment rights, the Colorado Supreme Court held that a probationary teacher was effectively renewed when the written notice was not received on or before April 15th. The school district could not deny renewal on the basis that the procedure for providing written notice had been initiated prior to the 15th or that the teacher had oral notice of the school board's vote not to renew on April 12th. In the absence of evidence that the teacher had sought to frustrate attempts to deliver written notice by avoiding receipt, the court held that written notice was not effective until received.[55]

Arkansas statute provides for automatic renewal of a teaching contract absent notice of nonrenewal. Substantial compliance with the notice of nonrenewal provisions was recognized by a federal court when oral notice of nonrenewal on the ground of declining enrollment was coupled with a letter from school administrators explaining that a computer error resulted in the issue of an erroneous contract for the upcoming school year. The court concluded that the letter constituted affirmative action by the school district clearly informing the teacher she would not be reemployed under the terms of the erroneous contract.[56]

Alabama statutes requiring that a probationary teacher be given notice of nonrenewal place the burden on local school boards to show that written notice was served. A local board attempted to deliver

53. Andrews v. Howard, 291 S.E.2d 543 (Ga. 1982).
54. Lamar School Dist. No. 39 v. Kinder, 642 S.W.2d 885 (Ark. 1982).
55. School Dist. RE-11J v. Norwood, 644 P.2d 13 (Colo. 1982).
56. Gillespie v. Board of Educ. of North Little Rock, 692 F.2d 529 (8th Cir. 1982).

written notice before the end of school year deadline to a probationary teacher, but was unsuccessful. The appellate court refused to overturn a trial court's factual determination that there was sufficient testimony to establish that the teacher intentionally sought to avoid delivery of the notice of nonrenewal.[57]

2.3d Aspects of Hearing

Some states offer greater due process protection than would normally be required under federal constitutional standards. In Iowa, the state administrative procedure act grants a right to a hearing in nonrenewals undertaken by a local board. However, such a hearing would not include an opportunity for the nonrenewed person to take depositions and receive delivery of taped board minutes.[58]

Oklahoma statute law requires that school boards grant notice and a hearing to probationary teachers who are not renewed. Due process in such cases has been further interpreted to require the local board to make findings of fact upon which the board's action is based so that a reviewing court may ascertain if the facts create a reasonable basis for the board's order.[59]

Under Oregon statute law a school board may dismiss a probationary teacher during the term of an annual contract for any cause the board may deem to be "in good faith." The dismissal must be preceded by written notice and an opportunity for a hearing. A probationary teacher who was dismissed and then granted a post-termination hearing by the school board alleged a denial of due process. While the teacher had a contractual property interest to serve a one-year term, the interest is subject to the school board's good faith decision to dismiss him. The Supreme Court of Oregon reviewed the school board's action and held there was no denial of due process. The court found that the dismissed teacher had received notice of the reasons for dismissal and an opportunity to be heard before the board prior to dismissal. After dismissal, he was given a formal hearing with representation by counsel and an opportunity to challenge witnesses, including the principal who sought his dismissal. Given the nature of the teacher's property interest, these procedures were sufficient.[60]

An Ohio tenured school teacher, dismissed following school board adoption of a hearing officer's finding that substantial evidence

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57. Stollenwerck v. Talladega Cty. Bd. of Educ., 420 So. 2d 21 (Ala. 1982).

58. Jones v. Loess Hills Area Educ. Agency, 319 N.W.2d 263 (Iowa 1982).

59. Jackson v. Independent School Dist. No. 16, 648 P.2d 26 (Okla. 1982). *But see* Gee v. Alabama State Tenure Comm'n, 419 So. 2d 227 (Ala. Civ. App. 1982) (failure to make written findings of fact immaterial).

60. Maddox v. Clackamas Cty. School Dist., 643 P.2d 1253 (Or. 1982).

justified charges of insubordination, sought to overturn dismissal on the due process ground that he was denied a meaningful hearing by the board. A three-judge federal district court reviewed state statutes granting the teacher an option to have dismissal proceedings before an administrative referee or the local board, and found that procedural due process had been afforded through the teacher's election of a referee. The teacher's claim that constitutional due process should include a right to appear before the board and contest findings of the referee's report was denied after the court concluded that the teacher's property interest in his job was sufficiently protected by his appearance and opportunity to contest before the neutral hearing officer.[61]

A teacher who received an unsatisfactory rating sought review and the right to be heard on a request to have the unsatisfactory rating expunged. The format for such a review was provided under regulatory standards and included the right of a petitioning teacher to make a statement and question those presenting evidence. The review was characterized by intemperate language by the petitioning teacher which led the hearing officer to terminate the proceedings following a morning session in which the teacher had described the superintendent as a "liar." In compelling another review proceeding, the appellate court held that the petitioning teacher had been denied due process when the hearing officer terminated the proceeding prior to the presentation of the teacher's rebuttal statement. The teacher's disruptive behavior was not a sufficient justification for the hearing officer's action, rather, the hearing officer was held to have abused discretion in terminating the proceedings.[62]

Under Colorado statute law, a hearing panel is constituted to review and make findings of fact relative to charges which would be grounds for teacher dismissal. A local board rejected the findings of one such panel and undertook to obtain responses to written interrogatories which were relied upon as a basis for dismissal of a tenured teacher. In review, the trial and appellate courts limited review to those documents and reports of the hearing panel, holding that the board's fact-finding was a coercive intrusion into the fact-finding role of the panel and thus violative of the Colorado statute law.[63]

Sufficient grounds for dismissal was challenged by a tenured teacher convicted of driving under the influence of alcohol. The reviewing court concluded that the teacher was denied a fair hearing on the charge when the school board permitted a previous auto accident and a

61. Jones v. Morris, 541 F. Supp. 11 (S.D. Ohio 1981), *aff'g*, 102 S. Ct. 1699 (1982).
62. Swanteson v. Board of Educ., 450 N.Y.S.2d 579 (N.Y. Sup. Ct. 1982).
63. Hudson v. Board of Educ., 655 P.2d 853 (Colo. Ct. App. 1982).

record of absenteeism to be considered at the dismisal hearing. Stripped of these latter allegations, neither of which were stated as charges in the written notice of offenses, the court concluded the record was insufficient to justify dismissal of the teacher.[64]

Maine's nonrenewal statute does not require the local board to give a cause for nonrenewal and confers no property right to continued employment for the probationary employee, despite a statutory amendment providing for a hearing and statement of reasons for nonrenewal upon request. The amendment did not create an implied "for cause" requirement under state law, and could not be used by a nonrenewed probationary teacher to claim a right to due process procedures that would obligate the school board to provide a hearing and carry the burden of proof to show good cause in a nonrenewal decision.[65]

A Pennsylvania school board's exclusion of expert testimony offered by employees demoted as a result of declining enrollment and economic conditions was held to be harmless error which did not deny due process of law. Although the employee's attorney was denied the opportunity to receive an answer as to whether the budget cut could be accomplished in some other fashion, he had elicited other responses from the witness which directly related to the validity of the board's decision to eliminate positions and demote employees. Therefore, the question would have only been cumulative in effect.[66]

The right to notice and a hearing are fundamental due process rights guaranteed by the fourteenth amendment whenever a property right to continued employment is denied. However, timely grievance arbitration under a collective bargaining agreement may be a valid alternative to a board hearing in disputed due process cases. An employee charged with theft, unauthorized use of school property and insubordination was given notice of his alleged misconduct and represented by a union official at a pretermination hearing before the school superintendent. Following the pretermination hearing he was advised that dismissal was recommended. He did not request a hearing before the board, but did grieve his discharge and ask for reinstatement. This proceeding met the requirements for a hearing, since an impartial arbitrator presided and granted the employee the right to present evidence and cross-examine witnesses.[67]

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64. Turk v. Franklin Sp. School Dist., 640 S.W.2d 218 (Tenn. 1982).

65. *See* Perkins v. Board of Dirs., 686 F.2d 49 (1st Cir. 1982).

66. Chester Upland School Dist. v. Brown, 447 A.2d 1068 (Pa. Commw. Ct. 1982). *See also* Sto-Rox School Dist. v. Horgan, 449 A.2d 796 (Pa. Commw. Ct. 1982) (distinguishing due process in suspension and dismissal).

67. Pedersen v. South Williamsport Area School Dist., 677 F.2d 312 (3d Cir. 1982). *See also* Levyn v. Ambach, 453 N.Y.S.2d 410 (N.Y. App. Div. 1982) (no error in hearing authority's disregard for mitigating testimony of teacher's psychiatrist).

Extreme or unusual circumstances involving substantial disruption of the school's educational program may justify immediate suspension of an employee without a pretermination hearing. In one such case, a Kansas teacher was alleged to have engaged in several instances of physical harassment and threats to students. The school board suspended the teacher without pay midway through his annual contract, then undertook to investigate the allegations and provide a subsequent due process hearing to consider termination. The court rejected any absolute due process right to a hearing prior to suspension without pay, balanced the due process right involved against the state's interest in preserving the orderly and safe operation of schools and found no basis for concluding that an erroneous deprivation of due process had occurred.[68]

2.4 DISMISSAL AND DISCIPLINE

The range of possible adverse employment decisions extends to many board actions in addition to dismissal. Demotion, denial of promotion or salary increment, reassignment, reprimand or transfer can be alternatives to discipline of the public school employee where authorized by state law. In general, however, the board's authority is most often challenged where dismissal of the employee is ordered.

2.4a Insubordination

Dismissal for unprofessional conduct, violation of corporal punishment policy and insubordination was upheld in an Arizona case in which the teacher failed to respond to repeated administrative requests to report on an incident in which she struck an elementary school pupil under her supervision. In defense of the teacher, it was established that her failure to report the incident or submit a written report was based upon the advice of her union representative and her legal counsel. However, the appellate court limited its review to a determination of whether the board's decision could be supported by substantial evidence and sustained the board.[69]

A tenured Colorado teacher was dismissed for neglect of duty and insubordination based upon failure to maintain classroom discipline and conform to administrative directives. Evidence to support these allegations included a history of incidents in past school years and documentation of warnings by the principal to correct perceived deficiencies.

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68. Crane v. Mitchell Cty. Unified School Dist., 652 P.2d 205 (Kan. 1982).
69. Fulton v. Dysart Unified School Dist., 651 P.2d 389 (Ariz. Ct. App. 1982).

The reviewing court held that prior warnings and the teacher's failure to conform thereto could properly be considered in an administrative hearing.[70]

Facts giving rise to a dismissal for insubordination were reviewed in a Supreme Court of Mississippi decision upholding a board's termination of a teaching contract. The record indicated that the teacher had repeatedly refused to sign an attachment to all district teaching contracts that had been proposed by the superintendent and approved by the board. After requesting on several occasions that the teacher sign the attachment, the superintendent wrote the teacher a letter telling her that if she did not sign within a given period of time he would recommend that she be dismissed for insubordination. The record disclosed other uncooperative behavior on the part of the teacher, but the high court concluded that even if the refusal to sign the attachment had been the sole reason for discharge it would have been sufficient.[71]

Following unsatisfactory ratings of classroom performance, an Arizona teacher was instructed to meet with the school principal on a daily basis for the purpose of reviewing lesson plans and upgrading performance. After sixteen meetings, the teacher refused to attend these sessions on the grounds that they were unproductive and designed merely as a scheme to support his dismissal. The school board's dismissal of the teacher on grounds of insubordination was upheld on the basis that his continuing refusal to attend the meetings was a willful disregard of a reasonable order.[72]

2.4b Unprofessional Conduct or Unfitness

A teacher who admitted that he brandished a starter pistol in an attempt to gain control of a group of hostile students was discharged for incompetence and gross lack of good judgment by a Louisiana school board. The appellate state court affirmed, finding that there was substantial evidence supporting a rational basis for the decision to terminate the probationary teacher.[73]

A state board determination that a school principal's use of the term "ass holes" in refence to parents and supporters of a rival football team did not warrant a five-day suspension was affirmed when the court considered the totality of circumstances surrounding the incident.[74]

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70. Dekoevend v. Board of Educ. of West End, 653 P.2d 743 (Colo. Ct. App. 1982).
71. Sims v. Board of Trustees of Holly Springs, 414 So. 2d 431 (Miss. 1982). *But see* Herod v. Board of Educ. of Hempstead, 456 N.Y.S.2d 84 (N.Y. App. Div. 1982) (substantial evidence necessary to support "gross insubordination" under the New York law.
72. Siglin v. Kayenta Unified School Dist., 655 P.2d 353 (Ariz. Ct. App. 1982).
73. Myres v. Orleans Parish School Bd., 423 So. 2d 1303 (La. Ct. App. 1983).
74. Board of Educ. of Howard Cty. v. McCrumb, 450 A.2d 919 (N.Y. Ct. App. 1982).

New York grants board statutory authority to the Commissioner of Education in terms of reviewing determinations of employee hearing panels. Although a hearing panel rejected testimony that a photography teacher had knowingly shown pornographic films to his students, the reviewing court affirmed the decision of the Commissioner to dismiss the teacher. The court found sufficient evidentiary support in the hearing panel record to justify the Commissioner's decision and refused to overturn the dismissal on grounds it was arbitrary or capricious.[75]

A New York appellate court held that a school custodian, who had a long record of competent service, but whose continuing personality problems, lack of cooperation with school teachers and other staff, and failure to heed instructions to temper his conduct, interfered with the school's harmonious operation so as to justify dismissal.[76]

A former tenured teacher's claim for backpay and benefits, which was pressed by the administrator of her estate after her death, was denied on the ground that the teacher had been granted sick leave and a further leave of absence amounting to a period of two years and could be said to have abandoned her position in the district.[77]

A California appellate court has ruled that evidence of a large number of absences due to personal illness and illness of family members, together with complaints from three of sixteen substitute teachers that they received no lesson plans would not sustain an allegation of unfitness which would support the teacher's discharge.[78]

2.4c Immorality

Following repeated incidents of touching and stroking females in his fourth grade class, a Washington teacher was admonished and placed on probation during the following year. In that year parental complaints were investigated by the school principal. The teacher's inappropriate physical contact with female students was found to have reoccurred regularly. Following discharge, the teacher sought appellate review on the grounds that he had not been afforded a program to correct remediable deficiencies. In reviewing the statute requiring evaluation, notice and an opportunity to remediate, the court of appeals found the teacher's conduct to be inapplicable to the remediation statute. Only deficiencies in conduct which have an educational aspect

75. Shurgin v. Ambach, 451 N.Y.S.2d 722 (N.Y. App. Div. 1982).
76. Koch v. Webster Cent. School Dist., 453 N.Y.S.2d 491 (N.Y. App. Div. 1982).
77. West v. Board of Trustees of Eggertsville, 453 N.Y.S.2d 511 (N.Y. App. Div. 1982).
78. San Dieguito Union High School Dist. v. Commission on Professional Competence, 185 Cal. Rptr. 203 (Cal. Ct. App. 1982).

or legitimate professional purpose such as classroom management, subject matter, knowledge or handling of student discipline, would be deemed remedial. The teacher's dismissal was affirmed.[79]

In contrast to the previous case, a termination of an assistant principal was reversed in a New Mexico case when the state board of education adopted the view that evidence of an adulterous affair and allegations of sexual harassment constituted "unsatisfactory work performance" which required an opportunity for the principal to be informed and correct the deficiencies involved. The state court of appeals affirmed, recognizing the broad discretionary authority vested in the state board to adopt policies on the evaluation of employees.[80]

A Missouri teacher's dismissal for immoral conduct was sustained after the board heard evidence that the male teacher had engaged in relationships and homosexual contacts with boys between the ages of thirteen and twenty-one. The issue on appeal was whether the permanent teacher's due process rights were infringed by the school board's decision to proceed with a hearing before criminal charges were resolved. The teacher refused to appear to testify at his dismissal hearing due to the pendency of the criminal proceedings. The appellate court favorably weighed the strong interest the school board had in determining whether the teacher was guilty of immoral conduct in concluding that there was no denial of due process.[81]

A Georgia school principal who was convicted of submitting false documents to the Internal Revenue Service was properly dismissed from his position on the statutory ground of moral turpitude. Conviction of a crime as a basis for moral turpitude was upheld by the federal district court, notwithstanding the principal's contention that the statutory standard was vague in that conviction of a crime may be construed to exclude some criminal convictions as a basis for an adverse employment decision.[82]

A tenured professional employee who filed a report of excused absence due to illness was dismissed by the school board when later events established that she had misrepresented her reason for absence to attend a professional conference. Although the Pennsylvania Commissioner of Education rejected good cause termination based on the ground of immorality, the state appellate court reversed, upholding the authority of the board to determine what constitutes "immorality" upon consideration of community standards and sufficiency of evidence.[83]

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79. Potter v. Kalama Pub. School Dist., 644 P.2d 1229 (Wash. Ct. App. 1982).
80. Board of Educ. of Alamogordo v. Jennings, 651 P.2d 1037 (N.M. Ct. App. 1982).
81. Lang v. Lee, 639 S.W.2d 111 (Mo. Ct. App. 1982).
82. Logan v. Warren Cty. Bd. of Educ., 549 F. Supp. 145 (S.D. Ga. 1982).
83. Bethel Park School Dist. v. Krall, 445 A.2d 1377 (Pa. Commw. Ct. 1982).

2.4d Incompetency

A local school board's decision to terminate a tenured teacher was sustained by the Supreme Court of Minnesota on the basis that substantial evidence of unfitness to teach, particularly evidence of lack of student progress, was supported in the administrative hearing record. The teacher had served for nineteen consecutive years in the school district, but had received previous notices of teaching deficiencies, including lack of rapport with students, poor communication with parents, failure to follow adopted school board lesson plans and irrational grading of students. Six classroom observations were undertaken over a five-month period and the teacher was regularly appraised of his deficiencies. In reviewing the entire record, the high court found that substantial evidence supported four major teaching deficiencies: (1) excessive use of worksheets, (2) lack of rapport, (3) lack of appropriate student discipline, and (4) lack of student progress. The latter basis, lack of student progress, was specifically related to express statutory grounds for discharge under Minnesota law.[84]

A case from Illinois illustrates the dimensions of effective evaluation when applied to a dismissal for negligent failure to supervise and instruct students. A tenured elementary school teacher was dismissed following parental complaints and classroom observations that consistently confirmed her inability to maintain classroom order or adequately prepare for subject matter discussion. Following initial complaints by parents and negative evaluations by the school principal, the teacher was informed by the school board of her specific deficiencies in teaching performance and provided with opportunities during the ensuing school year to improve. In the second year she was periodically observed by the principal and three other faculty members, all of whom evaluated the teacher's understanding of the subject matter and control over students as unsatisfactory. Sixty-four days of remediation were permitted, but no correction of deficiencies was noted by observers.

In affirming dismissal, the appellate court noted that the teacher's deficiencies were of long standing and represented fundamental teaching inadequacies. The notice provided was appropriate and the period of remediation was reasonable for correction of the deficiencies. The court's reliance on classroom observation reports completed by teachers and principal illustrates the considerable weight courts give to the evidentiary value of these records.[85]

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84. Whaley v. Anoka-Hennepin Indep. School Dist., 325 N.W.2d 128 (Minn. 1982).
85. Community Unit School Dist. v. Maclin, 435 N.E.2d 845 (Ill. 1982).

The Supreme Court of Iowa reversed a decision affirming dismissal of a teacher for failure to maintain a competitive wrestling program and lack of rapport with student athletes. Two evaluations, one of which rated the wrestling coach's performance as unsatisfactory on only two of forty-nine categories and a second which rated the coach as unsatisfactory in nine of the forty-nine categories served as part of the evidentiary record justifying dismissal. The court took note that the second evaluation was completed immediately after the evaluator met with disgruntled parents concerned with the wrestling program. No parent or student appeared at the dismissal hearing to corroborate complaints concerning the program, and the court considered significant the fact that the coach was not given an opportunity to remedy alleged deficiencies, nor were the deficiencies stated with sufficient specificity to inform the coach or the board of the factual basis for dismissal. A review of the record, including the testimony of students and parents who supported the coach, led the court to conclude that the charges lacked sufficient documentation to sustain the board's determination that dismissal was supported by a preponderance of the evidence.[86]

Lack of strict compliance with New Jersey statute law requiring classroom evaluations would not bar a school board from considering other factors relevant to teaching competency in determining to nonrenew a nontenured teacher. In affirming the nonrenewal, the local board's right to base its employment decision on a broad base of input from a variety of people, including students, parents and members of the public as well as a board member whose child was instructed by the teacher was sustained.[87]

2.5 REDUCTION-IN-FORCE AND ABOLITION OF POSITION

The principal legal challenges to school board layoffs based upon reduction-in-force continue to be related to the necessity for "riffing" and the selection of the employee to be "riffed." Courts appear willing to grant considerable discretion to local boards relative to the identification of the position or positions to be eliminated and remain somewhat more flexible when applying standards of due process in "riff" situations as opposed to dismissal for cause.

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86. Munger v. Jesup Commun. School Dist., 325 N.W.2d 377 (Iowa 1982).
87. Dore v. Bedminster Twp. Bd. of Educ., 449 A.2d 547 (N.J. Super. 1982).

2.5a Necessity for Reduction-in-Force

The Supreme Court Judicial Court of Maine grants substantial discretion to local school boards in determining when changes in local conditions "warrant the elimination of the teaching position."[88] When a school board voted to limit its budget for the academic year so that local tax effort would not be increased by more than two mills, two teaching positions had to be eliminated. The state's high court held that a school board decision to save money and conserve scarce educational resources by eliminating teaching positions did constitute a change warranting reduction-in-force (RIF) and only the board's exercise of that authority in bad faith for reasons unrelated to the best interests of education in the district would justify reversing the board's determination.[89]

A Minnesota school board's decision to place a full-time tenured teacher on unrequested leave of absence without pay was overturned on the grounds that the board failed to make specific findings of fact to justify alleged declines in enrollment and financial exigency.[90]

In interpreting the literal meaning of a collective bargaining agreement which provided that reductions in force could be compelled by a substantial reduction in student membership or financial resources, a Michigan appellate court held that "financial resources" meant all assets of the district and not just a projected $1,427,000 deficit based solely on projected revenues which fell short of potential operating expenses. In failing to consider the projected estimate of fund equity ($875,000) remaining at the end of the current fiscal year, the board had improperly construed the district's financial resources in invoking a layoff.[91]

2.5b Elimination of Position

Ordinarily, the bona fide elimination of a position is sufficient cause for termination of an employment contract. In a Kansas case, the school board discontinued a cooperative special education program and formed a new interlocal cooperative to provide special education services. In holding that the dissolution of the old cooperative and formation of a new administrative entity to provide special education services constituted good cause for nonrenewal of a tenured teacher's contract, the Supreme Court of Kansas was unwilling to infer bad faith or

88. 20 ME. REV. STAT. § 161.5.
89. Paradis v. School Admin. Dist., 446 A.2d 46 (Me. 1982).
90. Herfindahl v. Independent School Dist. No. 126, 325 N.W.2d 36 (Minn. 1982).
91. Port Huron Area School Dist. v. Port Huron Educ. Ass'n, 327 N.W.2d 413 (Mich. Ct. App. 1982).

arbitrary action on the part of the school district despite the dissenting opinion of one justice that the teacher had been singled out from among fifteen teachers for nonrenewal.[92]

Following the decision of two local districts to discontinue their participation in an educational cooperative, four tenured teachers assigned to the cooperative were suspended. Under New York statute law the four tenured teachers claimed that they should be considered employees of the school districts which took over the operations originally provided under contract with the cooperative and be granted tenure rights consistent with the tenure rights they maintained in the cooperative program. The New York appellate court, reviewing the statutory meaning for the first time, concluded that those teachers who were employed by the cooperative in programs taken over by the local districts were entitled to the benefits conveyed by the statute and could claim a right to be considered for newly-created local district positions based on consideration of their tenure in the cooperative.[93]

Declining enrollment and lack of sufficient funds served as the basis for a school board's transfer of assistant principals to teaching positions within a Washington school district. The board's policy effectively eliminated vice-principal positions in elementary schools, but a position of head teacher was created in five of the twelve affected schools in response to administrative concern. Only one of the transferred vice-principals was chosen to fill a head teacher position.

The transferred employees alleged that the school board was arbitrary and capricious in selecting the elementary school vice-principal position as the position to be eliminated and in the board's failure to give preferential consideration for head teaching positions to the transferred vice-principals. The Supreme Court of Washington approved the consolidation of roles and the reassignment to teaching positions as within the broad discretionary powers of a school board in providing for the district's educational goals and program continuity. Reclassification and consolidation of position was viewed as central to the board's authority to respond to budget deficits. Once reclassification to a head teaching position had occurred, the board was required by law to fill the positions with the most senior teacher.[94]

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92. Sells v. Unified School Dist. No. 429, 644 P.2d 379 (Kan. 1982). *See also* NEA-Valley Center v. Unified School Dist. No. 262, 644 P.2d 381 (Kan. 1982).

93. Acinapuro v. Board of Co-Operative Educ. Servs., 455 N.Y.S.2d 275 (N.Y. Sup. Ct. 1982).

94. Williams v. Seattle School Dist. No. 1, 643 P.2d 426 (Wash. 1982). *See also* Stafford v. Board of Educ., 642 S.W.2d 596 (Ky. 1982) (transfer void where board failed to include recommendation required by statute of superintendent in official minutes).

California law permits the layoff of tenured professional employees when "a particular kind of service is to be reduced or discontinued"[95] however some ambiguity surrounds the meaning of "particular kind of service." In interpreting the meaning of the statutory language, California courts considered a case in which the local board sought to eliminate eleven kindergarten through sixth grade classes to effectuate reduction in program. The teachers whose positions were eliminated argued that no service could be reduced which was not capable of elimination under state law. The court held otherwise, granting school board's the discretion to reduce services in state mandated programs provided that the reductions did not result in the elimination of services required under California law.[96]

Two school principals sought to challenge an Ohio school board's decision to transfer them to positions as assistant high school principals under a reduction-in-force compelled by declining enrollment. A federal district court denied a preliminary injunction and dismissed the complaint, holding that plaintiffs had not shown evidence of irreparable harm justifying injunctive relief nor had they established federal question jurisdiction in claiming a denial of due process attendance to their transfers. The principals had sought to establish an expectancy of employment to their positions compelling procedural due process before "riffing." The district court disagreed, recognizing that Ohio's reduction-in-force statute, as interpreted by the state courts, provides no due process and operates to negate any claim of entitlement to continued employment where staff reductions are necessitated by enrollment declines.[97]

Under South Dakota law, a continuing contract teacher dismissed for cause would be granted a right to notice and hearing. In constructing its RIF policy, a school board incorporated the due process elements of the statute but failed to grant hearings to dismissed teachers on the grounds that the statutory right to a hearing was inapplicable when discharge was solely for economic reasons. The Supreme Court of South Dakota rejected this argument, holding that once the board adopted a policy granting hearings on staff reductions of continuing contract teachers the board must follow the policy.[98]

2.5c Selection of Employee

The Supreme Court of Pennsylvania reviewed the suspensions of two teachers whose positions were eliminated due to a decrease in student

95. CAL. EDUC. CODE § 44955 (West).
96. California Teachers' Ass'n v. Board of Trustees of Goleta Union School Dist., 182 Cal. Rptr. 754 (Cal. Ct. App. 1982).
97. Lacy v. Dayton Bd. of Educ., 550 F. Supp. 835 (S.D. Ohio 1982).
98. Ward v. Viborg School Dist. No. 60-5, 319 N.W.2d 502 (S.D. 1982).

enrollment in the district. Under a system that has since been legislatively repealed,[99] professional employees could be suspended by weighing seniority and employee ratings in a formula which added a point to each employee's unweighted efficiency rating for each year of service in the school district. A "substantial difference" in unweighted efficiency ratings between employees would justify weighing the employee's rating by years of service to determine the employee to be "riffed." Under the Pennsylvania law, if no "substantial difference" in employment ratings was found, years of service alone would be determinative of which employee to "rif." In the case of one teacher the high court sustained a hearing officer's finding of fact, based upon credible testimony, that for purposes of reduction-in-force a difference of sixteen points out of a possible 160 points would constitute a substantial difference, and reinstated the teacher who had been "riffed" following the district superintendent's determination that eight points were sufficient to constitute a substantial difference. The second teacher was also reinstated after the court determined no anecdotal records nor classroom observations were part of the rating procedure and held, as a matter of law, that efficiency ratings which are unsupported by anecdotal records violated the regulations established for use of ratings set by the State Department of Public Instruction.[100]

In a case that focuses on a school board's previous bad faith relative to racially discriminatory hiring practices, the Boston School Committee was under a court order to desegregate but was experiencing a financial crisis. Layoffs were compelled, but the school committee faced conflicting obligations: layoffs based on collective bargaining agreements emphasized seniority, which if followed would violate court-ordered desegregation orders to maintain the then current percentage of black faculty and staff. The school committee decided to conduct layoffs so as to maintain the percentage of black faculty, and was ordered by the federal court to conduct administrative layoffs on the same basis.

The teacher's union challenged the layoff policy, arguing that since the initial desegregation objective had been accomplished the federal courts had no jurisdiction to interfere and asserting that the preference in layoffs for black faculty constituted a forbidden racial preference. The First Circuit Court of Appeals gave strict scrutiny to the layoff policy favoring recently hired black teachers and administrators and found that a compelling need for remediation to end a previous history of racial discrimination justified the policy. The policy was held to be

99. *See* PA. STAT. ANN. tit. 24, § 1. .125(b) (repealed 1979).
100. Carmody v. Board of Dirs. of Riverside, 453 A.2d 965 (Pa. 1982).

reasonably necessary to safeguard the achievement of desegregation realized in the preceding seven-year period. Finally, the court continued to exercise jurisdiction over desegregation policies of the school district, but noted that this was not a case in which a judicial formula had been imposed upon a resistant school board; rather, the court had substantially affirmed the policy on layoffs which the school committee had adopted. The court was not intrusive in the affairs of the local board largely because the board's interest in remedying constitutional violations was consistent with past court orders and adopted board policies to cure the effects of a formerly segregated system.[101]

As a result of both a reduction and discontinuance of services, a California school district gave notice that the services of selected permanent teachers would not be required in the district during the ensuing school year. The teacher union argued that the district had the burden in layoff proceedings to establish a need to retain junior administrators in preference to a senior union employee with an administrative credential. The court held otherwise, recognizing that the school district must have the discretion to select its administrative personnel to meet specific board needs and ruling that the classroom teacher could not obtain an administrative position solely because the administrator's position on a teacher seniority list was junior to that of the teacher.[102]

2.5d Realignment

While a school board has broad authority to create teaching positions and arrange teaching assignments, realignments that are designed to avoid the existence of a position which could be filled by an honorably discharged tenured teacher may be deemed arbitrary and capricious. The board refused reinstatement because the teacher was not qualified to teach one course in journalism required by the redefined position. However, another faculty member, whose teaching position was exclusively comprised of English courses, was competent to teach journalism. The court regarded the simple transposition of one class in English for one class in journalism as sufficient to continue the discharged faculty members employment, and prohibited the district from implementing the realignment when it appeared clear that the courses could easily have been interchanged among existing faculty without jeopardizing any tenured teacher's rights.[103]

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101. Morgan v. O'Bryant, 687 F.2d 510 (1st Cir. 1982).
102. Palos Verdes Faculty Ass'n v. Governing Bd., 183 Cal. Rptr. 196 (Cal. Ct. App. 1982).
103. Peters v. Board of Educ. of Rantoul Twp., 435 N.E.2d 814 (Ill. Ct. App. 1982).

In construing statutory provisions stipulating that seniority of service should guide the preference of the school board in reductions-in-force based on declining enrollment, the Supreme Court of Ohio has held that the statutory condition does not apply when a decline in enrollment within a particular course of study necessitates the transfer of a more senior teacher from that field. No decline in the actual number of teachers resulted when a senior teacher in an occupational education program was transferred to a position as a study hall teacher due to declines in the occupational program's student enrollment. The teacher's reliance on the statute to compel reassignment of a less senior teacher was misplaced.[104]

In interpreting Pennsylvania law, a school board could not be compelled to realign staff so as to permit retention of a teacher with multiple certification. The Commonwealth Court took the position that the district had properly considered the educational impact and practicability of such a realignment in determining not to retain the teacher with multiple certification.[105]

A provocative dicta with implications for bumping rights was offered by an Illinois appellate court in the course of denying a teacher's request for injunctive relief. The teacher was bumped in accordance with terms of a collective bargaining agreement when another more senior teacher's position was eliminated and the senior teacher chose the particular teacher's assignment. The teacher suffered no salary loss or loss of seniority rights in a reassignment to another school ten miles more distant from her home, thus the absence of irreparable harm led to denial of injunctive relief. However, the court observed that the bargaining agreement gave senior teachers the right to choose their particular assignments upon the elimination of their positions and noted that such a contract provision might unlawfully restrict the school board's statutory authority to transfer teachers.[106]

2.5e Call-Back Rights

Under Minnesota statute law, a formerly full-time teacher is not considered fully reinstated upon being given a part-time position. After being placed on unrequested leave of absence, the male physical education teacher accepted a part-time position in the district. When a part-time position instructing girls' physical education became available, the school district denied the position to the part-time male

104. Bohmann v. Board of Educ. of West Clermont, 443 N.E.2d 176 (Ohio 1983).
105. Godfrey v. Penns Valley Area School Dist., 449 A.2d 765 (Pa. Commw. Ct. 1982).
106. Wilfong v. Collinsville Commun. Unit School Dist., 438 N.E.2d 225 (Ill. Ct. App. 1982).

teacher who possessed appropriate certification and seniority. The Supreme Court of Minnesota ruled that the legislature's intended meaning of "reinstate" meant that a school district must make positions comparable in size to the positions lost available to teachers on unrequested leaves of absence due to reduction-in-force.[107]

In an action requesting mandamus to compel rehiring, a California appeals court required reconsideration of a board's employment decision when a laid-off teacher's preferential reemployment rights were violated. The appellate court found that the board's decision not to hire the more senior teacher was predicated on insufficient teaching experience at the middle school level and on insufficient academic preparation in physical science. While the latter consideration was a permissible qualification for the exercise of board discretion in rehiring, the imposition of prior teaching experience at the middle school level was not previously a prerequisite for hiring at the middle school level, violating a California recall provision which stipulated that the board could impose no requirement which was not imposed upon other employees who were continued in service.[108]

Because of declining enrollment, a Minnesota school board eliminated four secondary school principal positions and demoted the employees to assistant principals. Following board adopted rules, each principal was demoted in inverse order of employment as principals. On appeal of the board's determination the Minnesota Supreme Court held that the statute on employee discontinuance and preference for rehire should be governed by years of employment in the district as a teacher in any capacity.[109]

2.6 CONTRACTUAL DISPUTES

2.6a Board Policies and Contract Stipulations

Under Illinois law, a tenured teacher is not required to accept an offer of a new contract, nor is the teacher impliedly considered to have accepted a new contract solely because he or she continues teaching duties. Under the school board's authority to make employment agreements, a local board prepared a contract which provided for

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107. Walter v. Independent School Dist. 457, 323 N.W.2d 37 (Minn. 1982). *See also* Walter v. Board of Educ. of Quincy, 442 N.E.2d 870 (Ill. 1982) (suspended teacher's statutory right to have tenured to him or her any new position for which qualified).
108. Martin v. Kentfield School Dist., 184 Cal. Rptr. 566 (Cal. Ct. App. 1982).
109. McManus v. Independent School Dist., 321 N.W.2d 891 (Minn. 1982).

liquidated damages in the event of an unexpected resignation. While the board's authority was sustained, the court held that a tenured teacher could not be bound by the liquidated damages provision because he had not consented to the contract modification and was considered to be continued under the terms of his contract for the previous year.[110]

A Mississippi school board's adoption of salary supplements to create incentives for teachers was held permissible and was not modified by court order since it was established that district teachers had knowledge of the computations to be used for granting incentive pay and there was no evidence of mutual mistake, fraud or illegality when the teachers initially entered into the contract of employment.[111]

A contract provision that denied seniority credit for substitute service was upheld under New York law when the petitioning teachers failed to establish that the provision was manifestly contrary to public policy.[112]

A Connecticut teacher charged that the school board had dismissed her without cause and, alternately, had breached the leave agreement of her employment contract. In reliance on the agreement the tenured teacher had taken a sabbatical in which she took courses in library science. When she returned to school, a dispute over her assignment resulted when she was offered a position as a librarian or science teacher at schools other than the school at which she was originally employed. The Supreme Court of Connecticut upheld a jury verdict awarding the teacher $124,180 in damages, under the breach of contract claim, but refused to enjoin the board's dismissal of the teacher.[113]

A contract may be considered breached when one part acts unilaterally to change a material element of the original agreement. Under a negotiated agreement, the school district agreed to a salary schedule for a school year beginning August 23 and continuing for 180 days. Following the negotiations, the school board unilaterally altered the starting date of the school year. The change resulted in the loss of five working days and reduced teachers' salaries under a salary computation formula devised by the board. Although authorized by law to change the starting date of the school year, that authority would not enable the board to avoid liability for contract breach where the contract terms were clear and unambiguous. The appellate court concurred with the trial court's judgment that the board's unilateral act

110. Arduini v. Board of Educ. of Pontiac, 441 N.E.2d 73 (Ill. 1982).
111. Weatherford v. Martin, 418 So. 2d 777 (Miss. 1982).
112. Wiener v. Board of Educ. of East Ramapo, 455 N.Y.S.2d 828 (N.Y. App. Div. 1982).
113. Cahill v. Board of Educ. of City of Stanford, 444 A.2d 907 (Conn. 1982).

of changing the starting date had effectively denied compensation under the terms of the negotiated agreement and the board was liable for the salary losses plus interest.[114]

In a similar case from Illinois, a board of education was held to have exceeded its discretionary authority in adding an uncompensated work day to make up for Hostage Day, a legal holiday declared by the President of the United States. Although Illinois law grants substantial discretion to the local board in setting the school calendar, the state legislature had reduced the mandatory minimum number of school days to allow for the Hostage Day holiday. The Illinois appellate court ruled that teachers were entitled to an additional day's compensation for working a day added by the board to make up for the legal holiday.[115]

De facto dismissal was recognized by an Oregon appeals court after a determination that the tenured teacher's resignation was never formerly accepted prior to the time it was effectively withdrawn by the teacher. The board's belated acceptance of the teacher's resignation and refusal to allow the teacher to continue in employment was a dismissal which came within the jurisdiction of administrative agency review.[116]

The contract of employment between a teacher and the local Georgia school board stipulated that the employee could not resign without the local board's consent and added that resignation without board consent would authorize the local board to recommend a year's suspension of certificate. The local board refused to accept the teacher's resignation, sought to hold a hearing, dismiss the teacher for immorality and recommend revocation of certification. On appeal, the teacher invoked the contract provisions which limited the board to recommend suspension for a year due to wrongful termination of contract. The state board's decision sustaining the teacher's position was affirmed on appeal and the appellate court directed that the local board must confine its action to proration of salary for the period served prior to the resignation, recommendation of the one-year suspension of certificate, and a letter of reprimand to be placed in the teacher's personnel file.[117]

A Colorado elementary school principal who was not renewed based upon unsatisfactory performance evaluations contended that he was transferred to a position as a classroom teacher rather than demoted.

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114. Monroe Cty. Commun. School v. Frohliger, 434 N.E.2d 93 (Ill. Ct. App. 1982).
115. Purn v. Board of Educ., 437 N.E.2d 33 (Ill. 1982).
116. Pierce v. Douglas School Dist. No. 4, 653 P.2d 243 (Or. Ct. App. 1982).
117. Cobb Cty. Bd. of Educ. v. Vizcarrondo, 293 S.E.2d 13 (Ga. Ct. App. 1982).

The district had offered the former administrator a contract as a classroom teacher, but he sued for damages and reinstatement under provisions of an agreement between administrators and the school district which stipulated that the district must give reasons for the transfer of an administrator. The court found that the agreement did not apply to the former principal, holding that his demotion to a teaching position was not encompassed by a contract provision for notice and reasons in a transfer from one administrative position to another.[118]

Where a collective bargaining agreement precludes sick leave and maternity leave from being counted towards seniority, a teacher may not rely on inaccurate statements by her principal that he did not think there would be a problem with seniority. The Massachusetts teacher was not renewed due to declining enrollment and lack of seniority following her maternity leave, and the court refused relief, pointing out that the written contract governed the matter, and the principal's comments were not authorized by the school board.[119]

A teacher who was granted leave and left employment in January due to medical reasons was requested to produce documentation of satisfactory mental health by the following August. The teacher's failure to respond to this request resulted in a board resolution treating that failure as a resignation. When the teacher appealed, post-termination hearings were held and dismissal was justified upon submission of unsatisfactory performance ratings, testimony detailing lack of classroom control and failure to follow school rules. The Pennsylvania Commonwealth Court held that the post-termination procedure sufficient to insure adequate due process and ruled that the teacher's contract was effectively terminated by mutual consent when the teacher made no effort to contact the school and preserve the employment relationship.[120]

2.6b Administrative Regulations and Statutory Provisions

Under the terms of a Michigan collective bargaining agreement, a teacher could take a leave of absence but failure to notify the school district office of an intent to return would be considered a voluntary resignation. Under provisions of the state law, however, a tenured teacher could not be denied continuing tenure solely by taking a leave of absence, nor could termination of a tenured teacher take place without mutual consent. The school district sought to terminate a

118. Marsh v. St. Vrain Valley School Dist., 644 P.2d 41 (Colo. Ct. App. 1982).
119. Burton v. School Commun. of Quaboag, 432 N.E.2d 725 (Mass. Ct. App. 1982).
120. Bruckner v. Lancaster Cty., 453 A.2d 384 (Pa. Commw. Ct. 1982).

tenured teacher on leave of absence when the teacher failed to notify the board of her intention to return within a contractually established deadline. The appellate court took note of the fact that the district failed to advise her of the contractual requirement to notify the board of an intent to return and concluded that the teacher's effort to immediately notify the board of that intention once she received notice that the statutory deadline had passed was evidence that the teacher did not consent to termination and had not in fact resigned her tenured position.[121]

A full-time teacher within the meaning of the Arkansas statutes cannot be denied the minimum salary due to teachers because of a written contract for a lesser amount.[122]

In interpreting statutory provisions for sabbatical leaves which permit one leave after seven years of service, a Pennsylvania appellate court ruled that a prior leave may not be counted towards the next ensuing sabbatical because computation of service required under statute begins only when the prior leave is completed.[123]

An Illinois administrative aide returning from sabbatical leave was not entitled to the same position he left under the provisions of a statute providing that a teacher, principal or superintendent shall be returned to a position equivalent to that formerly occupied.[124]

An Indiana school principal who sought mandamus to compel reinstatement to a position abolished due to declining enrollment was successful in establishing that the board's failure to provide timely notice was a breach of the employment contract and applicable state statute law, but mandamus was denied where a remedy compensating in monetary damages for the breach of contract was available.[125]

A county school superintendent's nomination of his wife, a teacher, to a position in the school district's central administration was held violative of the West Virginia antinepotism law.[126]

In response to a request for a declaratory judgment subsequent to a report of suspected child abuse filed against a school teacher, a Pennsylvania court has ruled that public school teachers are not subject to the regulations or provisions of the Pennsylvania Child Protective Services Law.[127]

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121. Board of Educ. v. Cunningham, 317 N.W.2d 638 (Mich. Ct. App. 1982).
122. Marvel v. Coal Hill Pub. School Dist., 635 S.W.2d 245 (Ark. 1982).
123. Pennsbury School Dist. v. Walker, 447 A.2d 1089 (Pa. Commw. Ct. 1982).
124. Thrash v. Board of Educ., 433 N.E.2d 866 (Ill. 1982).
125. State *ex rel.* Cleary v. Board of School Dirs., 438 N.E.2d 12 (Ind. Ct. App. 1982).
126. West Virginia Educ. Ass'n v. Preston Cty. Bd. of Educ., 297 S.E.2d 444 (W. Va. 1982).
127. Pennsylvania State Educ. Ass'n v. Commonwealth, 449 A.2d 89 (Pa. Commw. Ct. 1982).

2.7 TENURE

2.7a Probationary Period

A New York court ruled that a teacher had fulfilled the necessary three-year probationary period for award of tenure despite employment as a regular substitute and time lost due to revocation of license for a three-month period from June 30 to August 9, 1979. Unique to the question of credit for substitute service was the fact that the teacher had performed the same duties in her substitute role as when serving as a probationary teacher.[128]

New York law permits a teacher to receive tenure-earning credit during the probationary period for satisfactory service as a regular substitute. However, a probationary teacher who sought credit for one and one-half years of prior substitute service was required to serve the full three-year period of full-time probationary status when it was determined that his substitute service as a teacher of secondary science was undisputedly unsatisfactory.[129]

Under the New Jersey statute, tenure rights are not available to substitute teachers, but would include teaching staff members who work in positions requiring certification, possess the appropriate certification and have served the requisite probationary period. In a New Jersey Supreme Court ruling, remedial and supplemental teachers hired at an hourly wage to provide special education services for local school districts were qualified for tenure. Specifically overruling a previous decision which excluded Title I teachers from the application of the tenure law if their contract specified "temporary employment" the court ruled that a contractual provision could not be interpreted to waive a grant of tenure governed by statute rather than contract.[130]

In determining that a teacher had not met the statutory mandate of "two consecutive years of employment" in a school district, the Supreme Court of Kansas ruled that a gap of one month in which the uncertainty of federal funding had delayed a probationary teacher's employment defeated her claim to tenure. Although the teacher had begun employment the previous year, she was not rehired for a second year until late September of a school year which began in August. This one month gap

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128. Pascal v. Board of Educ., City of New York, 454 N.Y.S.2d 772 (N.Y. Sup. Ct. 1982).
129. Robins v. Blaney, 451 N.Y.S.2d 853 (N.Y. App. Div. 1982).
130. Spiewak v. Rutherford Bd. of Educ., 447 A.2d 120 (N.Y. 1982). *See also* Lavin v. Board of Educ. of Hackensack, 447 A.2d 516 (N.J. 1982) (increase in salary based upon crediting military service is a statutory entitlement rather than an element of the employment contract). *See also* Union Twp. Teachers Ass'n v. Board of Educ., 447 A.2d 524 (N.J. 1982).

in employment meant that the tenure "time clock" had to be reset, as consecutive service could not include the year of employment prior to the gap.[131]

Under Oregon statute a probationary teacher may be dismissed at any time during the probationary period for any cause considered in good faith sufficient. In contrast, permanent teaching status, conferred after not less than three successive school years, includes the right to a full evidentiary hearing and review of a dismissal. A teacher in his third year of probation was initially advised that he would be reemployed for a fourth year on April 1, but was dismissed on May 19, five days before the end of the third school year. The appellate court held that notice of renewal did not confer permanent status and termination prior to the end of the third year with minimal due process was permissible.[132]

A Maine teacher who sought a due process hearing on the nonrenewal of her teaching contract based her claim on statutory interpretation and terms of an expired collective bargaining agreement. The teacher had completed one year's service in the district, voluntarily left her position in the district and then returned five years later to teach another subject at another grade level. In inferring a requirement of two consecutive years of service before an entitlement to a continuing contract guaranteeing a right to hearing, the Supreme Judicial Court of Maine presupposed that consecutive years was essential to a district's effective evaluation of teacher competence.[133]

The statute law of West Virginia has been interpreted to grant continuing contract status to auxiliary and service personnel of a school district after three years of acceptable employment. A written contract is not considered essential once the employee completes the three years of acceptable service, but a critical factor in determining continuing contract status invoives the local board's treatment of the employee, particularly the board's allocation of funds from funding sources. In applying this notion the Supreme Court of Appeals of West Virginia has held that employees funded exclusively by Comprehensive Employment Training Act funds would not, solely by virtue of the funding source, be entitled to the due process protections afforded the continuing contract auxiliary personnel.[134]

An Alabama appellate court, in interpreting the point at which tenure vests for supervisory personnel, has held that a statutory provision requiring the supervisor to serve three consecutive years before

131. Schmidt v. Unified School Dist. No. 497, 644 P.2d 396 (Kan. 1982).
132. Wesockes v. Powers School Dist. No. 31, 646 P.2d 68 (Or. Ct. App. 1982).
133. Lane v. Board of Dirs., 447 A.2d 806 (Me. 1982).
134. Bonnell v. Coffman, 294 S.E.2d 910 (W. Va. 1982).

attaining continuing service status does not require that the employee be hired for a fourth consecutive year in order for tenure rights to vest.[135]

The right to tenure is generally controlled by state statute, but interpretation of the statutory language may vary. Missouri courts, taking cognizance of the express wording of the state's "*Teacher* Tenure Act" (emphasis added), have held that the law plainly contemplates only situations involving permanent teachers. While a teacher might qualify for tenure, be promoted to a principalship and retain tenure in the school district, it would not be possible to obtain tenure solely on the basis of performance as an administrator.[136]

2.7b Tenure by Default or Acquiescence

A New York principal was held to have acquired tenure by estoppel when it was determined that the school board had acquiesced in the administrator's continued service beyond the three-year probationary period despite reassignment in which the administrator continued to receive a principal's pay and perform duties similar to that of a principal.[137]

2.7c Tenure Status

A Kansas appellate court has ruled that a tenured teacher does not lose the due process privileges of tenure even if he or she resigns to accept a teaching position in another district. In construing the Kansas statute granting tenure, the court found nothing to proscribe cessation of tenure upon resignation. Absent such a proscription, a tenured teacher who resigned and was subsequently reemployed at the school district's discretion was entitled to due process and/or reinstatement when the board voted not to renew his contract.[138]

Under the provisions of New Mexico tenure laws, a certified school instructor who previously acquired tenure rights as a school instructor loses those rights as a result of being reemployed for the next consecutive school year as a district administrator. The specific case involved a district superintendent who was held to have abandoned his tenure status as an instructor when he assumed the management role.[139] However, Florida permits a limited exception to this policy by

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135. Wooten v. Alabama State Tenure Comm'n, 421 So. 2d 1277 (Ala. Civ. App. 1982).
136. Meloy v. Reorganized School Dist., 631 S.W.2d 933 (Mo. Ct. App. 1982), and Fuller v. North Kansas City School Dist., 629 S.W.2d 404 (Mo. Ct. App. 1981).
137. Orshan v. Anker, 550 F. Supp. 538 (E.D.N.Y. 1982).
138. Arneson v. Board of Educ. of Unified School Dist. No. 236, 652 P.2d 1157 (Kan. Ct. App. 1982).
139. Atencio v. Board of Educ. of Penasco, 655 P.2d 1012 (N.M. 1982).

specifically exempting continuing contract teachers who resign to accept positions as "educational consultants" with cooperative education program.[140]

2.8 CERTIFICATION

2.8a Certification Standards

Indiana law has been interpreted to require that teachers be licensed or certified pursuant to uniform, statewide standards. This public policy was judicially reviewed when a school district terminated an uncertified teacher midway through the school year. The court held that despite the district's knowledge that the teacher was not licensed the district board would not be estopped from raising the invalid contract as a defense to wrongful termination.[141]

Under New York law a teacher who is not certified by the state is unqualified and cannot be employed or paid by a public school board. Furthermore, the state commissioner of education is authorized by statute to prescribe regulations governing certification and to award certification with approval of the board of regents. The commissioner waived a requirement for an administrative approval prior to certification in the case of a tenured teacher who had served seven years in a local district on the grounds that local administrators acted unreasonable in withholding a recommendation on the teacher's behalf. The local district challenged the award of certification by the commissioner as an abuse of discretion, but the New York Court of Appeals held that the award of certification was rationally based upon the commissioner's determination that the district's grant of tenure was satisfactory proof of a "recommendation" under the regulatory requirement.[142]

The Supreme Court of Wyoming has held that the state board of education is empowered by statute to administer certification of superintendents and acted within its scope of authority in denying certification to a proposed candidate for certification. Among the minimum requirements for certification, the applicant did not possess sufficient training or experience as a teacher in a recognized K-12 setting.[143]

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140. *See* Wahlquist v. School Bd. of Liberty Cty., 423 So. 2d 471 (Fla. Dist. Ct. App. 1982).
141. Switzerland Cty. School Corp. v. Sartori, 442 N.E.2d 702 (Ind. Ct. App. 1982).
142. Bradford Cent. School Dist. v. Ambach, 451 N.Y.S.2d 654 (N.Y. 1982).
143. Wyoming State Dep't of Educ. v. Barber, 649 P.2d 681 (Wyo. 1982).

2.8b Decertification, Revocation or Suspension

A teacher who is employed by a local board and who has received tenure under Louisiana law is protected from decertification by the state board of elementary and secondary education except where fraud or misrepresentation in obtaining the certificate is involved. Conduct of a tenured teacher is under exclusive control of the local board, and since decertification for any other reason than fraudulent misrepresentation would effectively discharge the tenured teacher, an act authorizing the state board to revoke or suspend the certificate would amount to a denial of tenure. An act granting the state board this authority was struck down as unconstitutional by the Supreme Court of Louisiana on the grounds that it regulated an area protected by teacher tenure laws and under the exclusive control of local school boards.[144]

144. Johnson v. Board of Elementary and Secondary Educ., 414 So. 2d 352 (La. 1982).